INDEX.

PAGE

TABLE OF CASES.

TEXT BOOKS CITED.

Supreme Court of the United States

October Term, 1926

No. 88

MALCOLM E. NICHOLS, Collector of Internal Revenue of the United States for the District of Massachusetts,

Plaintiff in Error,

vs.

HAROLD J. COOLIDGE and AUGUSTUS P. LORING, Executors of the Will of Julia Coolidge,

Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF OF TYSON S. DINES, PETER H. HOLME, HAROLD D. ROBERTS, AND J. CHURCHILL OWEN, *AMICI CURIAE*, ON BEHALF OF MARY DEAN REED, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF VERNER ZEVOLA REED, DECEASED.

Tyson S. Dines, Peter H. Holme, Harold D. Roberts and J. Churchill Owen, with consent of counsel for the parties above named, and after first having asked and obtained leave of Court, file this brief herein, and to show grounds for their special interest in the case at bar state the following facts:

STATEMENT

The writers of this brief represent Mary Dean Reed as sole executrix of the last will and testament of Verner Zevola Reed, her deceased husband, in a suit now pending in the Federal District Court for the District of Colorado and entitled *Reed v. Howbert.* By this suit Mrs. Reed seeks to recover from Howbert, United States Collector of Internal Revenue, the sum of approximately one million dollars, paid under protest as an additional estate tax levied under the Federal Estate Tax Law of 1918, in respect to the property in a *trust created in 1902.* Mr. Reed *died April 20, 1919*—a few months after the passage of the law.

The trust was irrevocable and provided for the payment of the income to the decedent for life with remainders to his descendants. The value of the property actually and absolutely transferred to the trust was at the time of transfer approximately two and a quarter million dollars. The value of the assets in the trust at the date of death and assessed as of that date was about four million dollars. Thus an incremented capital value of approximately one and three-quarter million dollars accruing to the corpus after its transfer to the trust and never owned or transferred by the donor of the trust was taxed as part of the decedent's estate. Furthermore, over a half million dollars worth of the assets in the trust at date of death were substitute assets resulting from reinvestments by the trustee. These had never been owned or transferred by the donor, but were taxed as a part of the estate.

The application of Section 402 (c) of the Revenue Act of 1918 to these facts—a gift made years prior to its enactment—has raised the question of the constitutionality of the retroactive provisions. This is one of the main

points involved in the case at bar, of *Nichols v. Coolidge*. In both cases there is the retroactive taxation of a transfer on the theory that it was intended to take effect at death. In both cases the rights were created prior to the passage of the Estate Tax Law. Although there are a few slight differences in the facts of the two cases, these differences are not material in the questions here to be discussed, as the general effect and result of the tax in both cases is the same. This is our justification for asking the court's and counsel's permission to intervene and file this brief *amici curiae*.

In the following pages we shall not contend that Congress has not power to levy an estate tax. That is settled. We shall not argue that Congress has no power to tax transfers intended to take effect in possession or enjoyment at death. That also is settled. The constitutional point raised by these cases is limited to the proposition that Congress cannot tax transfers intended to take effect in possession or enjoyment at death *when the transfers were completed prior to the passage of the taxing law*. The tax collected is not an inheritance tax, estate tax or tax on the passing of property at death, but is simply a tax on a past and completed gift. Thus analyzed we shall then proceed to show that these provisions impose a tax unconstitutional, first, as an unapportioned direct tax; second, as a deprivation of property without due process of law within the Fifth Amendment; and third, as a violation of the fundamental conceptions of free government. Finally we shall venture to suggest a possible way to clear these hurdles of unconstitutionality: that Section 402 (c) reasonably construed does not apply to transactions taking place prior to the 1916 Estate Tax Law.

ARGUMENT.

I.

THE NATURE OF THE FEDERAL ESTATE TAX ACT OF 1918 AS APPLIED TO TRANSACTIONS COMPLETED BEFORE THE LAW WAS ENACTED.

IN ITS ESSENCE IT IS A TAX UPON A PAST TRANSACTION—A TAX UPON A COMPLETED TRANSFER.

The Revenue Act of 1918 provides in part as follows:

"Sec. 401. That * * * *a tax* equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) *is hereby imposed upon the transfer of the net estate* of every decedent dying after the passage of this Act * * *."

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *;

"(c) To the extent of any interest therein of which the decedent has at any time *made a transfer*, or with respect to which he has at any time *created a trust*, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this act*)."

"Sec. 407. That the Executor shall pay the tax to the Collector * * *." That if there is an unpaid excess "Such excess shall be *a lien upon the entire estate* * * *."

"Sec. 409. That unless the tax is sooner paid in full, it shall be a *lien* for ten years *upon the gross estate* of the decedent * * *."

> "If (a) the decedent *makes a transfer* of, or *creates a trust* with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case *the tax in respect thereto* is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein *at the time of such transfer*, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax * * *." (Italics ours.)

The ultimate, the essential nature of the retroactive provisions of this tax, rather than the name by which the statute in its entirety goes, is the first important matter to be determined. This essential nature is to be ascertained by looking to the substance of the Act and to the effect of the Act when these retroactive features are applied to the transactions of the persons claimed to be within its scope. We believe that this Act retroactively applied is neither an estate tax, an inheritance tax, nor a death duty of any kind. It is either a tax on certain persons because they transferred property or created rights prior to the passage of the law, or a tax on past transactions. In either case it is a direct tax.

> Congress said: "*A tax is hereby imposed upon the transfer of the net estate*" etc.

This is not a tax upon the *receipt* of anything by anybody. Congress did not approach the problem from the viewpoint of the recipient. The law looks at the entire

property of a man about to die and it says: Before you can finally pass on any interest in what is yours at the moment of death (or in some instances in what used to be yours), the Government must first be satisfied.

The thing sought to be taxed, "the net estate", is no isolated phrase shorn of a context, neither is it a theoretical or algebraic concept or other mathematical abstraction. It is always a direct derivative of the gross estate and what constitutes the gross estate the law makes clear, as well as what may be deducted therefrom. Every item that goes into the gross estate directly swells the resultant net estate. Congress did not intend to enforce a tax on a man's obligations, on the expense involved in the machinery of winding up his affairs after death. It did not see fit to tax the first $50,000.00, nor to tax property that had recently paid a government estate tax, nor to tax his public or charitable gifts. It therefore allowed certain deductions (Sec. 403).

Nevertheless, Congress included all his property in its definition of his gross estate, the value of which, item by item, the executor's report must state. Furthermore, when it dealt with the subject of payment of the tax, and was making sure that the Government should be protected, it did not limit the Government's lien to the net estate; it provided that the lien should be "upon the entire gross estate" (Sec. 407) or "upon the gross estate" (Sec. 409). So when the statute is read as a whole, as of course it must be, the thing obviously sought to be taxed and actually taxed is the passage or the transfer of property—call it the transfer of a value, or the transfer of the net estate, or what you will—*it is the transfer of property*, the thing of value that human beings are all seeking to get. That this is a tax on the transfer of the decedent's estate and primarily collectible from his estate as a whole seems obvious.

This meaning of the Act is made particularly clear in Sec. 409 where, in regard to enforcement of 402 (c), it is provided:

> "If the decedent *makes a transfer* of or *creates a trust* with respect to any property in contemplation of death or intended to take effect in possession or enjoyment at or after his death * * * and if in either case *the tax in respect thereto* is not paid when due, then the transferee, trustee * * * etc., shall be personally liable * * *."

There can be no possible ambiguity as to the meaning and correlation of these words. The *making* of *a transfer* or the *creation* of *a trust* are the acts sought to be taxed, and the tax is imposed *in respect thereto.*

Now apply this law, this tax upon the transfer of the net estate, to the facts of the Reed case, as they were taken for purposes of argument on demurrer. In 1902, seventeen years before the passage of the 1918 Estate tax law, Reed created a trust; he put certain property absolutely out of himself and into the trustee; he reserved no power to recall it; the transaction was complete; he had finally parted with title. When he made these gifts he was doing a legitimate thing. He was not evading. There was no occasion for the existence of an ulterior motive. The 1918 law was passed a few months before he died. It taxes his precedent transfers of these assets and makes his estate pay not 25% of their value when he parted with them—that would have been bad enough—but 25% of everything in the Trust based upon the values into which the assets had grown on the date of death. Values and assets are taxed which never at any time had been the decedent's.

Years before the 1918 law, in 1907, Mr. and Mrs. Coolidge joined together and transferred to trustees certain real and personal property, which was to be held ir-

revocably, the trustees agreeing to pay the income in certain proportions to them for life, remainder to survivor for life, remainder equally among their children. This was an out and out transfer; the trustees had full control. This was a perfectly legitimate act; no evasion was present. Then the 1918 law comes into being and taxes this past act of transferring property, and collects the tax from the executors and from the beneficiaries through an imposition based, not on the aggregate value of the property parted with, but on the value into which this property had grown at the time of the death.

Therefore, when we look, not to the name by which this whole tax law is called, but to the essential nature of the retroactive clauses when applied to transactions such as these, what can this law be but a tax on a past transfer of property, a past transaction, a completed gift?

The law plainly taxes the *transfer* of decedent's property. A common argument for the Government is that some kind of transfer took place at the decedent's death. This is clearly erroneous. Years before death the decedent had made an irrevocable transfer of the property to the trustee and it had ceased to be the decedent's property in any sense of the word. The transfer was complete and absolute the instant this property was placed in the trust and, when decedent died, no title whatsoever passed. It is true that in the Reed Case the beneficiaries of the trust actually began to get the income on the decedent's death, while in the case at bar the Coolidge beneficiaries had been receiving the income since 1917; but in each case the thing into the enjoyment of which the beneficiaries came was not the property of the decedent. All that the decedent had was a life interest which did not and could not pass at death because it ended the moment of death. Long before the decedent's death and before the passage of this tax law, the children had the ownership in this property subject to the life estate; and when death came

and the life estate was terminated, they simply came into the enjoyment of their own property rights. If John Doe had leased property to Mr. Reed for life, John Doe would come into the enjoyment of the property on Mr. Reed's death but it would be absurd to say that this amounted to a transfer from Mr. Reed to John Doe. Then, too, it is always to be borne in mind that the tax is not levied upon the fact of anyone's coming into enjoyment.

That no transfer took place at the decedent's death is particularly evident in the case at bar; for there, in 1917, one year before the tax law was passed and four years before her death, Mrs. Coolidge assigned all her life interest to the beneficiaries. This meant that at her death nothing passed from her; her death was simply the signal for the distribution of the corpus of the trust fund.

The absurdity is even more clearly illustrated by a case of a transfer made in contemplation of death.* If

---

*Foot Note: From time to time in this brief we shall refer to the tax on transfers in contemplation of death. Although such transactions differ from the type of transfer involved in the case at bar, they afford an additional test of the statute. The same sentence of the law links together transfers in contemplation of death and transfers intended to take effect in possession or enjoyment at or after death and these two types of transfer are treated in an identical manner throughout the statute. Since the statute must be given some consistent meaning applicable to all its parts, a resort to the illustration of a transfer in contemplation of death is justified as throwing light on the real nature of the tax in the case at bar.

Moreover, the "before and after" clause in section 402 (c) is a single clause applying equally to each of these types of transfer. If this clause is unconstitutional as to either type of transfer, it makes the law unconstitutional as to both types of transfer. Under well settled rules of law, there is no possible severability in the application of this "before and after" clause. It is unnecessary to elaborate this point because we do not need to argue the question of the invalidity of the tax on a past transfer in contemplation of death,—but, in order to show the court that our illustrations are applicable, we wish to point out that the invalidity of a retroactive tax on such a transfer would make the retroactive "before and after" clause invalid as applied in the case at bar.

in 1907 Mrs. Coolidge had made an absolute gift in contemplation of death, both the title and possession and enjoyment of the property would have passed at once and at her death absolutely nothing would have happened to the property. Nevertheless, the law would impose a tax on the transaction. Certainly this could not be a tax on the passing of the property at death.

The 1907 transfer is the only transfer from or by the decedent and the only transfer which could be taxed. That the transfer is the thing taxed is the view supported by the authorities.

The matter is well expressed in *Hunt v. Wicht*, 174 Calif. 205, 162 Pac. 639 (1917). That case involved a transfer intended to take effect at death. The decedent had made a deed of property to his wife, but had placed it in escrow for delivery to her on his death. By the California law, at the time when the deed was made, transfers intended to take effect at death were not taxable; when the death occurred, however, the law made such transfers taxable. In holding the tax unconstitutional, Chief Justice Angellotti said:

> "*The succession to the property by the grantee which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate.* The whole estate conveyed vested irrevocably in interest at once, notwithstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. *His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death, or at any time subsequent to the delivery in escrow.*" (Italics ours.)

Keeney v. New York, 222 U. S. 525, 56 L. Ed. 299 (1912), a case that doubtless will be cited by the Government, also forcibly illustrates this point. That case involved a transfer similar to the one in the case at bar. It does not involve this constitutional question because the law taxing the transfer was in effect *before* the transfer was made. But it does throw light upon the proposition that in truth the tax as applied to the facts in the Reed and Coolidge cases is a tax on *past transfers*. At the time of transfer decedent was a resident of New York, and the property was situated in New York. At the date of death, decedent was no longer a resident of New York, and the property was no longer situated in New York. New York collected a tax, on the theory that this was a transfer intended to take effect at death. Even though New York had no jurisdiction to collect a tax on property passing from a non-resident, this Court upheld the tax because New York had jurisdiction over the property at the date of the transfer.

Mr. Justice Lamar said (222 U. S. 537; 56 L. Ed. 305):

> "But the statute does not impose a tax on the property, but on the transfer. *The validity of that burden must be determined by the situation as it existed in 1903, when the deed was made.* At that time the grantor was a resident of the state of New York. This personal property there had its situs. She there made a transfer, which was taxable, regardless of the residence of the trustee or beneficiary. The fact that the assessment and payment were postponed until the death of the grantor would be a benefit to the remainderman in the many instances in which values decreased. But where the power to tax exists, it is for the state to fix the date and to say when and how the amount shall be ascertained and paid. The fact that the

> liability was imposed when the transfer was made, in 1903, and that payment was not required until the death of grantor, in 1907, does not present any Federal question." (Italics ours.)

The New York law involved in that case was similar to the Federal law involved in the case at bar. This holding of this Court conclusively shows that what is taxed is the original transfer and not a devolution of property at death.

The wording of the Federal Law itself makes this perfectly plain. The tax is based on property

> "of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or *after* his death."

If Mrs. Coolidge and all the other beneficiaries of the trust could have gone to the Trustee before this tax law was passed and revoked the trust, and could have had the Trustee give this property to some third person, then Mrs. Coolidge's death would have had no connection whatsoever with this property. Yet this statute would authorize the collection of this same tax. The same section of the statute applies to transfers which take effect *after* death. In the case of such a transfer, nothing passes at death—the original transfer is the only thing which could be the object of the tax.

The plain, simple truth is that this property did not pass from Mrs. Coolidge on her death, and that this law does not even purport to tax what passed at Mrs. Coolidge's death. *The tax is on the transfer into the trust.* The only connection whatsoever between this tax and death is that death is used to describe the type of transfer which is taxed, and that death fixed the time for the payment of the tax.

It may be well to point out here that there was nothing testamentary about this transfer. It was irrevocable and not ambulatory. In the case of a revocable trust, the creator may change the situation at any moment up to his death just as he may change his will. In such a case, there is in a sense a transfer at death. In the present case where the trust was irrevocable, it is the very opposite of "testamentary" and there is no transfer at death under any conceivable theory.

In defending the numerous suits brought by taxpayers to recover taxes assessed under the 1916 estate tax law, as well as under the 1918 law, counsel for the Government have resorted to various theories as to the real nature of these statutes. It is obvious in their statement of these theories that they have sought to avoid the admission that either of these statutes was retroactive in the full sense, the brazen sense of the word. They have tried to show that even though reaching back into the past, there was still some act, some occurence in the instant case, taking place subsequently to the enactment, that would give the law a prospective operation. This is a commendable attitude on the part of Counsel, for it is inherently offensive to any right thinking person, to any lover of fair play, to hold a man to the consequences of his act when the consequences were unforseeable and came about as consequences only because of the later enactment of a law.

We believe that there is but one tenable theory as to the nature of this tax when applied to a case in which the trust was created or the gift made before the date of passage of the Act and that is that it is *a tax on the past completed transfer or gift*. We deem this to have been absolutely and finally determined by *Shwab v. Doyle*, 258 U. S. 529 (1921), and the group of cases decided therewith, and by the case of *Lewellyn v. Frick*, 268 U. S. 238 (1925).

If the Supreme Court in any of those cases could have found another theory upon which to hang the tax, there would have been no occasion for any consideration or discussion of the question of retroactivety; the question of whether Congress intended to tax past acts or transfers would not have been present. A contrary conclusion sustaining the tax would therefore have been reached in each of those cases. In short in *Shwab v. Doyle* and in *Lewellyn v. Frick* this Court has killed all other theories. The *Shwab v. Doyle* group of cases and the late case of *Lewellyn v. Frick* are particularly conclusive on this point because they involved substantially every sort of case that could arise under the sub-paragraphs of Section 402 and its predecessor in the 1916 law.

While we believe there is but one tenable theory as to the nature of this tax retroactively applied, namely that it is *a tax on a past completed transfer*, nevertheless, before proceeding to a discussion of the constitutional questions, we feel it desirable briefly to consider certain other theories which, from time to time, have been advanced and which we deem unsound. Thus we hope to leave unquestionable our premise as to the true nature of the tax.

(A) THE COMING INTO POSSESSION THEORY OF THE NATURE OF THE TAX.

According to this theory the Government asserts that this is not a tax on a past transfer, but a tax on the present privilege of coming into possession, and hence that the act does not really affect past transactions. Stated somewhat differently, the theory is that the tax is on the right of the remaindermen to come into possession of their remainders.

The answer to this theory is manifold:

First, the law expressly purports to be a tax on a transfer, not on the privilege of receiving.

Second, the decision of the courts show that it is a tax upon a transfer.

In *Curley v. Tait*, 276 Fed. 840 (1921), at page 844, the Court said in a case involving the 1916 law:

> "The present act, unlike its federal predecessor, is an estate tax, and *not a tax upon the right to receive*. If the Government's contention be sustained, the tax will come, not as in *Wright v. Blakeslee*, *supra*, or in *Cahen v. Brewster*, 203 U. S. 543, * * * out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not." (Italics ours.)

This Court in *Shwab v. Doyle*, *supra*, must have deemed the 1916 law to impose a tax on the transfer because by denying it a retroactive effect it held that it could not reach the past transfer. If this Court had regarded it as a tax upon the coming into possession it would have reached a contrary conclusion as to the taxpayer's right to recover in that case.

Again in *Edwards v. Slocum*, 264 U. S. 61, decided in January of 1924, this Court through Mr. *Justice* Holmes said at page 62 in speaking of this estate tax law of 1918:

> "But this is not a tax upon a residue; it is *a tax upon a transfer* of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton v. Moore*, * * *. It comes into existence before, and is independent

of, the receipt of the property by the legatee." (Italics ours.)

See also *Y. M. C. A. v. Davis*, 264 U. S. 47 (1924).

A third phase of the answer to the coming into possession theory is that it is inconsistent with the taxing of transfers in contemplation of death, as well as of gifts to take effect in possession *after* death. In the same sentence of paragraph (c) of Section 402, gifts in contemplation of death as well as gifts intended to take effect in possession or enjoyment *at or after* death, are dealt with and so dealt with as to be placed on a parity.

If a man expressly makes a gift in contemplation of death a week before he dies, there is no coming into possession when he dies—that occurrence has already taken place, and if the law does not tax the transfer, there is nothing for it to tax. Furthermore, the tax could be successfully evaded today if expressly in contemplation of death a man parted with all of his property just before he died. No one would come into possession at or after his death and no tax would be assessable. Suppose an estate consisted of only two items: One a gift in contemplation of death, the other of equal value, being a gift to take effect at death. We submit that it would be utterly at variance with the structure of this statute to select the first item and say as to it that the tax was on the transfer, but as to the second item it was a tax on the coming into possession. This would be to adopt two different theories as to the nature of the tax according as it were to be applied to one or the other of two types of gift embraced in the same sentence of the statute and obviously treated alike.

In reporting on the Federal Estate Tax of 1916 the committee on Ways and Means said (Report No. 922, 64th Congress, First Session):

"Your Committee deemed it advisable to recommend a Federal Estate Tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees."

In addition to all these reasons for holding the tax to be in its nature a tax upon the transfer and not upon the coming into possession, we suggest that the very method of taxation under which the estate, rather than the legatee or remainderman, pays the tax is more than significant. The rate of the tax and its amount are based not on what is received, but on what is transmitted. Even in the case of transfers intended to take effect at or after death, or transfers made in contemplation of death, the burden of the tax falls, not upon the transferee, but upon the residuary estate (except where the assets of the estate are not sufficient to pay the tax).

> *Farmers Loan & Trust Co. v. Winthrop*, 238 N. Y. 488, 144 N. E. 686; certiorari denied 45 Sup. Ct. 225 (1925).
>
> *Bemis v. Converse*, 246 Mass. 131; 140 N. E. 686 (1924).
>
> *Pratt v. Dean*, 246 Mass. 300, 140 N. E. 924 (1924).

The date of coming into possession does not necessarily fix or have any relation to the date of paying the tax. If the decedent has made a gift to take effect twenty years *after* his death, the tax will be payable at his death, or twenty years before there is any coming into possession. If the property be lost, stolen or destroyed in the interval the donee never will come into possession.

Even if this could be construed to be a tax on the right to come into possession of a remainder where the property rights are already vested in those taking pos-

session, the tax would be a direct tax and unconstitutional because not apportioned, as argued elsewhere in this brief.

> *Dawson v. Kentucky Distilleries*, 255 U. S. 288 (1921).
>
> *Matter of Pell*, 60 App. Div. 286; affirmed 171 N. Y. 49 (1902).
>
> *Craig v. Taylor & Sons*, 192 Ky. 36, 232 S. W. 395 (1921).
>
> *Thompson v. Kreutzer*, 112 Miss. 165, 72 So. 891 (1916).
>
> *Thompson v. McLeod*, 112 Miss. 383, 73 So. 193 (1916).

(B) THE UNCOMPLETED TRANSFER THEORY OF THE NATURE OF THE TAX.

According to this theory, transactions such as took place in 1907 in the Coolidge case and in 1902 in the Reed case are sought to be viewed as not really complete until death made them so; and that as this event occurred after the law was passed the law is not truly retroactive.

One fatal defect in this theory is that it fails to cover the case of gifts in contemplation of death, and is absolutely inconsistent with the attempt to tax them as pointed in our argument, *supra*. Again two distinct theories of the tax would have to be resorted to in applying Sec. 402 (c) according as the Department might be dealing with one sort of gift or the other.

When the property was transferred to the trust in 1907, the owner had performed her last act in respect to it and nothing she could say or do thereafter could change what she had done. It is true the date of full possession and enjoyment on the part of her children was postponed

until her death; but to press that point forces the government back into the coming into possession theory already discussed. So far as Mrs. Coolidge's or Mr. Reed's rights were concerned, the transfer was irrevocable, indefeasible and complete and its terms were fixed when it was made. It must always be borne in mind that the whole scheme of this law was developed from the end of the transaction opposite to that which forms the basis of the usual state inheritance tax laws. It is the "whence" rather than the "whither" which must be considered.

In holding unconstitutional a similar law, the New York Court said in *In re Webber,* 151 App. Div. 539 at 541:

> "The deed became operative immediately upon its delivery with the intention of vesting title in the trustees for the purposes of the trust, which provided for the final distribution of the property, and only the benefits were postponed to the happening of a particular event, and the law of that contract must be determined by the law as it existed when the deed became effective."

This uncompleted transfer theory is obviously but another effort to get away from the obnoxious retroactive tax—it is an effort to fasten upon something occurring *after* the passage of the law as the basis for the imposition.

(C) THE MEASUREMENT THEORY OF THE NATURE OF THE TAX.

This theory may be stated in several ways, but all are variations on the same theme. One possible statement of this theory is that past transfers *inter vivos* may properly be included in the computation of the tax as a measure of the tax even though the thing taxed is only the transfer of property owned at the time of death.

This theory would permit, without taxation, the transfer of an entire estate in contemplation of death; because, while the measure would exist, the matter to be taxed, i. e., the transfer of *things owned at death,* would not No tax could be collected in those cases where the decedent dies without leaving any estate, as in *Levy v. Wardell,* 258 U. S. 542 (1921). Congress certainly never intended any such result as that.

Furthermore, this theory would here result in a tax on A's property measured by the value of B's property and thus fall within the inhibition recognized in *Knowlton v. Moore,* 178 U. S. 41, and so conclusively illustrated in the hypothetical case set out by Mr. Justice White at page 76 (quoted *infra*).

Another statement of the same theory is that the "net estate", the *value* of which determines or measures the tax, includes everything taxable under the act; but that the "net estate", the *transfer* of which is taxed, includes only property which was actually possessed by decedent at his death.

Sec. 401 of the Act provides:

> "A tax equal to the sum of the following percentages of the value of the *net estate* (determined as provided in Section 403) is hereby imposed upon the transfer of the *net estate* of every decedent" * * *. (Italics ours.)

In other words, this theory requires that the phrase "net estate" shall have two different meanings in the same section and sentence of the law; that "net estate", as it first appears in Section 401, and the *value* of which is to measure the tax, shall be different from "net estate", used in the next line of the same sentence, the *transfer* of which is taxed. There is no ground for believing that Congress intended different meanings for these two iden-

tical phrases. Under the well settled rule of construction they should be given the same meaning.

The scheme of the Act inherently shows that the past transfers themselves are taxed and that they do not serve merely as the measure of a tax on something else. As indicated earlier in this argument the tax in certain events may be collected from the transferee or trustee personally or out of the actual property transferred. See Sec. 409. Neither one of these possibilities is consistent with the theory that the past transfers are merely measuring rods. They are the substance, not the shadow.

Sec. 409 provides:

> "If (a) the decedent makes a transfer of, or creates a trust with respect to any property in contemplation of or intended to take effect in possession or enjoyment at or after his death * * * and if in either case *the tax in respect thereto* is not paid when due then the transferee * * * shall be personally liable," etc. (Italics ours.)

The measurement theory would make these words meaningless. The tax is on and in respect to these transfers as definitely as words can place it there.

The Government in its District Court brief in the *Coolidge* case, stated that this tax "is imposed not upon a transfer of property but upon the transfer of the 'net estate' which under the statutory definition is not property, but is merely a value", and that "The tax is measured not by the *transfer* of property but by the *value of property*". This sounds like a play on words.

In the Reed case the Executrix reported on all the property of the testator, but excluded that covered by this trust. The usual deductions were subtracted and the tax paid on the net estate. Later the Commissioner valued the assets of the trust as of the date of death and collected a

tax of 25% on the total valuation. The amount of the tax in dispute was imposed upon, and arose solely from the value of these trust assets included as a part of decedent's net estate. Call this additional tax what you may; a tax on the net estate, a tax on "a value", a tax on an occasion, a tax on the "cessation of an interest"—the fact is that all of the assets included in the past gift were appraised and 25% of that appraised value had to be paid by the Executrix and if she had had nothing with which to pay it, the trustee and the beneficiaries would have been held personally liable for it.

Counsel for the Government in some of these cases have contended that this is "*a tax on a present occasion* measured by some past events"; "a tax generated by the decedent's death".

If Congress intended this to be a tax on a "present occasion", viz., a tax *on death*, why did Congress use the expression "A tax * * * is hereby imposed *upon the transfer of the net estate* of every decedent dying after the passage of this Act"? How could language be more aptly chosen to express the intent to tax the *transfer of property?* This is not a tax on the privilege or the fact of dying measured by the decedent's past life and conduct. If Congress had meant that, it could easily have said so. The resort to a fanciful, hairsplitting, contrary-to-fact argument carries with it its own refutation.

Even if the law could be construed in accordance with the measurement theory, it would be unconstitutional. No amount of subtle reasoning can obscure the plain fact that this is in truth a tax in respect to a past gift and not merely a tax on something else but measured thereby. It is well settled that a valid excise tax on one thing cannot be measured by the value of some other thing which cannot be taxed. *Knowlton v. Moore, supra; Wallace v.*

Hines, 253 U. S. 66 (1919); *Delaware L. & W. Ry. Co. v. Pennsylvania*, 198 U. S. 341 (1904); *Galveston, Harrisburg, etc., Ry. Co. v. Texas*, 210 U. S. 217 (1907); *Western Union Telegraph Company v. Kansas*, 216 U. S. 1 (1909).

Our position is not in conflict with *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911). There the tax was expressly upon the privilege of doing business, not upon income. The privilege was measured by the income of the corporation. This was upheld even though a part of such income would have been exempt from ordinary taxation. The decision was rested expressly on the ground that this was in substance as well as form, a tax not on the income, but on the true value of the privilege of doing business. The total income, including that from exempt sources was held a true and reasonable measure of the value of the privilege taxed. In *Maxwell v. Bugbee*, 250 U. S. 525 (1918), the New Jersey Inheritance Tax Law was upheld even though the rate of tax was made to depend upon all of the property of the decedent whether within the taxing jurisdiction of the state or not. Extraterritorial, nontaxable property was not *taxed* in that case, although the *rate* of tax in New Jersey was fixed by a wholly reasonable standard which incidentally included nontaxable property. But even the property considered in determining the rate of tax was property all belonging to the decedent at his death, and there was no intimation that property *previously disposed of* and belonging to another person could be considered for any purpose.

According to the measurement theory, the tax in the present case is a tax on A's estate measured by B's property. In other words, it is a tax on B's property collected from A. There is absolutely no authority even suggesting that such an exaction would be valid.

(D) THEORIES THAT THE TAX IS ON THE PASSING OF PROPERTY AT DEATH OR ON THE CESSATION OF AN INTEREST.

In endeavoring to arrive at the true nature of this tax—what it really is—as applied to the facts of the Coolidge or Reed case, it may be helpful to point out one or two more things which it is not. When retroactively applied, *it is not a tax upon the passing of property at or after death.* In the case of the gifts to the trust prior to 1916, in the Reed case the property did not pass from the decedent on his death. Upon the transfer made irrevocably several years before, the property had ceased to be Reed's. When he died no title passed from him. What the beneficiaries got was not his life estate, nor his property. Long before Mr. Reed's death his children had the ownership in this property, subject to his life estate, and when he died and his life estate ended, they merely came into the enjoyment of their own property.

We should like to quote again from *Hunt v. Wicht*, 174 Calif. 205, involving a transfer to take effect at death. In holding unconstitutional a subsequent tax on the transfer the Court said (p. 209):

> "The succession to the property by the grantee * * * was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate * * * His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death * * *."

See *In re Webber, supra.*

The impropriety of holding that this law taxes any succession at death is apparent if we consider what would have been the case if in 1907 Mrs. Coolidge had made an absolute *gift in contemplation of death.* Both the title and possession and enjoyment would have passed at once;

at her death absolutely nothing would have happened and yet under the 1918 law a tax would have been levied. We submit this clearly shows that the tax cannot be a tax on the passing of property at death. If no property passes there is nothing on which to levy a tax.

In *Knowlton v. Moore*, 178 U. S. page 78, speaking of death duties, the Court said:

> "Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed."

In *Wardell v. Blum*, 276 Fed. 226 (1921), the Circuit Court of Appeals of the Ninth Circuit, in holding that a wife's share in community property was not taxable as a part of her husband's estate under the Federal Law, said at page 227:

> "All inheritance taxes are imposed on the transfer of the net estate of the 'deceased', from which the conclusion is inevitable that the property upon which such a tax is imposed must, in truth, be the property of the deceased."

The law does not say anything about property passing at death. The tax is on the transfer into this trust. The only connection whatever between this tax and death is that death is used to describe the type of transfer which is taxed, and that death fixes the time for the payment of the tax.

Again in neither the Coolidge nor the Reed case can it be a tax upon the *"cessation of an interest"* at death. Mrs. Coolidge had no interest in the trust which ceased at death. Mr. Reed had a life interest in the income of an irrevocable trust created in 1902. It was his life interest, and this alone, that ceased at death. What was that in-

terest worth at the moment of death? What was its fair market value? Obviously nothing. May a million dollar tax be collected on the cessation of an interest worth nothing? But counsel may say his interest was in the whole trust and the whole trust was worth four million dollars. If the fact of having any interest draws into the estate the whole source of this interest we come to this absurdity:

Suppose Reed's interest, instead of being a right during his life to all the income, had been a right to one per cent of all the income for life. Could it then be contended that the value of the entire trust must be taxed when that meagre life estate ceased. Could it be reasonably contended that the same interest would have ceased in the supposed case of the right to one per cent of the income, as would have ceased if Reed had owned the four million dollars worth of assets unaffected by any trust? Obviously no. If the interest which ceased on the day of his death, be valued as of that moment when *ex hypothesi* his expectancy was nothing, it must be found to be valueless. Then on what reasonable theory can it be taxed as though it were worth $4,000,000? We submit that on these facts the tax cannot be deemed to be a tax on the cessation of an interest.

After having considered the coming into possession theory, the uncompleted transfer theory, the measurement theory and the theories that the tax is on the passing of property at death or on the cessation of an interest, each of which does violence to the plain meaning of the words of the Act and fails to meet consistently the various calls of the statute, we submit that the law in reality compels the taxing of a past transfer—a past transaction. The group of cases considered by this Court with *Shwab v. Doyle, supra*, dealt with a variety of past transactions and in each instance held in substance that the *1916* law properly construed did *not* reach those transactions completed

before its enactment; thus rejecting all these theories that a prospective occurrence was being taxed. When the 1918 Act is applied to a state of facts like those in the Coolidge case the statute necessarily raises the constitutional question. Congress in this instance has passed a statute expressly on the theory of retroactive taxation. Is it constitutional?

II.

THE FEDERAL ESTATE TAX ACT IN TAXING GIFTS MADE BEFORE ITS ADOPTION IS UNCONSTITUTIONAL.

(A) IT IS AN UNAPPORTIONED DIRECT TAX.

The United States Constitution provides, Article 1, Section 2, Clause 3:

> "Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, * * *."

And in Article 1, Section 9, Clause 4:

> "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

As said by the United States Supreme Court in *Eisner v. Macomber* at 252 U. S. 189, 206 (1920), in speaking of the 16th amendment:

> "A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an

apportionment according to population for direct taxes upon property, real and personal. *This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.*" (Italics ours.)

Since the tax under consideration in this case was not apportioned according to population, it is clearly unconstitutional if it is a direct tax.

We propose to give no long review of the various decisions of the Supreme Court dealing with the question of direct as distinguished from indirect taxes. We believe that no complete and all-inclusive definition of the distinction has ever been framed. We doubt if any ever can be framed until the scope of the legislator's ingenuity in devising tax laws can be defined and classified and the infinitude of combinations into which man's business transactions may fall be accurately known.

We believe, however, that the greatest existing treatise on the subject is found in *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601 (1895), and that all the learning that went before, may, after it went into that crucible, be passed over and the conclusions of that case be taken as at least the new starting place for discussion.

We submit that the mere difficulty of making a scientific distinction between direct and indirect taxes is not controlling. In the very nature of the situation the definition must develop as new tax laws and new sets of fact come before the Courts for consideration. A reading of the decisions of this Court shows that in a cloudy and obscure realm, a line of demarcation has gradually been worn. On the one side fall the cases of direct taxation, on the other those of indirect taxation. That a distinction exists and that the framers of the Constitution in-

tended the two different classes to be differently dealt with and to be subject to different limitations must be granted.

We believe that the following is the most complete definition of the distinction to be derived from the cases up to this time:

When a tax is absolute and inevitable, it is direct; when it is not absolute or inevitable, it is indirect. When the tax is imposed regardless of any act or failure to act on the taxpayer's part, it is direct; when it is imposed because the taxpayer's voluntary act or failure to act brings him within the terms of the law, it is indirect. In other words, when a man has the power so to arrange his transactions through the exercise of his own volition, as to bring them within or keep them without the taxable realm as covered by a given statute, that statute must be classified as one imposing an indirect tax. But when the creation or the bringing into being of the taxable status could not be avoided by the taxpayer, the tax is direct.

In the Pollock case, reported in 157 U. S., Chief Justice Fuller, at page 558, says:

> "Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under *no legal compulsion* to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, *and the payment of which cannot be avoided*, are direct taxes." (Italics ours.)

On the rehearing of the case, the Chief Justice, as reported in 158 U. S. at page 627, said:

"Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the Government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, *although imposed merely because of ownership and with no possible means of escape from payment*, as belonging to a totally different class from that which includes the property from whence the income proceeds?

"There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of the framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself." (Italics ours.)

In *South Carolina v. U. S.*, 39 Court of Claims, 257, it is said:

"A tax is obligatory; from it there is no escape. *An excise is voluntary: the purchaser who would pay it cannot be compelled to purchase.*" (Affirmed in 199 U. S. 437 (1905).) (Italics ours.)

In *Thomas v. U. S.*, 192 U. S. 363 (1904), the Supreme Court has held valid a stamp duty on sales of corporate stock squarely on the ground that there was no absolute and unavoidable demand. Mr. Chief Justice Fuller said at page 371:

"The stamp duty is contingent on the happening of the event of sale, *and the element of absolute and unavoidable demand is lacking.* As such it

falls, as stamp taxes ordinarily do, within the second class of the forms of taxation." (Italics ours.)

In *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911), this same test was applied in passing upon the validity of the Federal Excise tax on corporations. Mr. Justice Day said for the Court at page 151:

> "The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi corporate organizations; or when applied to insurance companies, for doing the business of such companies. As was said in the Thomas case, 192 U. S. supra, the requirement to pay such taxes involves the exercise of privileges, and *the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable.*" (Italics ours.)

It may be helpful to give a moment's consideration to the *capitation* tax, expressly classified by the Constitution as a direct tax. What is it which makes a capitation tax a direct tax? Clearly it must be something in the nature of the tax, and not the mere fact that it is an isolated type of taxation included within direct taxation merely by an arbitrary classification. The essence of the capitation tax is the fact that it is a tax upon persons. Clearly the direct character of the tax is not changed by the fact that it may be limited to a certain class of persons, such as citizens of the United States or male citizens over twenty-one years of age. All will agree that such a tax is a direct tax. Suppose the class of persons taxed to be narrowed down to include only bachelors. Could any one doubt that this would be a direct tax? Or, suppose the tax were applied only to persons who had theretofore been mar-

ried. This tax on a certain class of persons would be just as direct as any other capitation tax. In fact, a tax upon any class of persons classified according to their condition at the date of enactment of the tax law, or according to their past conditions or past actions, could be no different in principle. The same characteristic which makes the ordinary capitation tax a direct tax brings any unavoidable tax upon any determinable group of persons within the same category. This characteristic is the absolute and unavoidable demand.

When a past act is taxed, the taxpayer has no choice but to pay it. When the 1918 law was passed, Mr. Reed, Mrs. Coolidge and all other persons who had made similar contracts or transfers in the past were made absolutely liable for the tax. Nothing they could have done or refrained from doing after they knew of this law would have altered their tax liability. They had given away their property in a certain way and they had to die. The tax bore directly on the persons of these transferors because no matter what happened or failed to happen after the passage of the law, the liability remained unaltered. When a law taxes all persons who have done certain acts in the past, the tax is not on the happening of any event, but is essentially a tax on a class of persons—persons classified by their past actions; and utterly unlike a tax on persons who *shall* import or *shall* manufacture or sell goods in the future. If this tax be indirect then a tax on all persons who obtained a divorce in the past or who had red hair in the past might be levied as an indirect tax. So considered the tax here is obviously more of a capitation than a privilege tax, for if there ever had been a privilege, it had long since been exercised and was non-existent when the Statute was passed. The fact that payment of the tax is postponed until death in no way alters the direct nature of the tax. The liability attached *directly* by the passage of the law and *not indirectly* by

reason of some future act or event. The future event of death was certain and unavoidable and merely fixed the pay-day.

A tax on lands is a direct tax. A tax on the income from land is a direct tax; so is a tax on personal property or the income therefrom. A tax on property because of ownership is a property tax, a direct tax. Likewise, a tax on the exercise of an essential element of ownership is a property tax.

In *McNeir v. Anderson*, 10 F. (2nd) 813 (D. C. N. Y. 2-15-26), the 1924 Gift Tax was held to be unconstitutional as a direct tax unapportioned. At page 815, Judge Augustus Hand said:

> "* * * I cannot see how this tax can be defended, which would not seem to be an excise or license tax for the privilege of doing something, but a tax upon a necessary incident of the ownership of property, which has not been apportioned, * * *."

In *Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288 (1921), a Kentucky statute taxing all liquor withdrawn from bond was involved. In holding the tax to be a property tax, Mr. Justice Brandeis for the Court said at page 294:

> "In fact, the tax is one imposed upon each lot of whiskey at the time it is removed from bond within the state. The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower Court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified), for the purpose of making some one of the only uses of which it is capable; i. e., consumption, sale, or keeping for

future consumption or sale * * *. The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' *To levy a tax by reason of ownership of property is to tax the property.*" (Italics ours.)

In *Craig v. Taylor & Sons*, 192 Ky. 36, 232 S. W. 395 (1921), the Supreme Court of Kentucky says (p. 39):

"The mere right to own and hold property cannot be made the subject of excises, since the levying of a tax by reason of ownership of property is to tax the property."

In *Thompson v. Kreutzer*, 112 Miss. 165, 72 So. 891 (1916), the Court says (p. 167):

"A tax on a thing is a tax on all its essential attributes; and a tax on an essential attribute of a thing is a tax on the thing itself. * * * No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership which is not also a tax on property."

Thompson v. McLeod, 112 Miss. 383, 73 So. 193 (1916), involved a statute taxing the extraction of turpentine from any trees in the state. The Supreme Court of Mississippi held that this was a property tax, saying (73 So. 194):

"This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent right of the owner to

pull the ripe pecans from his pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead."

In *Eisner v. Macomber*, 252 U. S. 189 (1920), the Supreme Court held that the tax on stock dividends was a direct tax not protected by the Sixteenth Amendment because stock dividends, whatever Congress might label them, in their essence are not income. A tax thereon is a tax on past accumulations which cannot be an income tax, cannot be a privilege tax, but is a direct tax.

A consideration of a decision rendered by the Supreme Court prior to that of *Eisner v. Macomber* will possibly make the significance of the *Macomber* case more obvious.

In *Towne v. Eisner*, 245 U. S. 418 (1917), the Supreme Court held that the 1913 Revenue Act, which provided that net income should include "dividends" and also "gains or profits and income derived from any source whatever", did not as a matter of construction attempt to tax a stock dividend made in 1914 against surplus earned prior to January 1, 1913.

Seeking to cover the subject of stock dividends, Congress, in the Revenue Act of 1916, and after the *Towne* decision, expressly declared that "a stock dividend shall be considered income". Congress thus sought to bring stock dividends within the scope of the Sixteenth Amendment. The *Macomber* case in effect decided that Congress could not make white black by legislative fiat; that Congress could not widen the scope of a constitutional amendment by the device of a legislative declaration or definition; and that calling a thing "income", which was really something else, could not blind the eyes of the court to the reality. In reaching its conclusion, the fact that this definition as to stock dividends was included in a section of the statute dealing with items which in truth consti-

tuted income, did not prevent the court from segregating this definition and determining its true character. The context in which the definition stood and the company which it kept failed to give this definition a character which it did not deserve.

In the case at bar, Section 402 (c) of the Statute, which would be appropriate and free from objection as an estate tax if prospectively applied, absolutely loses its character as an estate tax and as an excise tax when retrospectively applied. Consequently, under the reasoning of the *Macomber* case, the court will seek out the true, the real nature of this section when applied to past transactions and will not be misled by the fact that this section is associated with valid excise features or by the fact that it is part of a statute which goes by the name of an estate tax.

In the *Macomber* case, the Supreme Court answered the Government's argument that the tax was indirect as follows (252 U. S. at page 217):

> "* * * the Government, * * * virtually abandoning the contention that a stock dividend increases the interest of the stockholder or otherwise enriches him, insisted as an alternative that, by the true construction of the Act of 1916, the tax is imposed not upon the stock dividend, but rather upon the stockholder's share of the undivided profits previously accumulated by the corporation; the tax being levied as a matter of convenience at the time such profits became manifest through the stock dividend. If so construed, would the act be constitutional?
>
> "That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests might be valued in view of the condition of the

company, including its accumulated and undivided profits, is equally clear. *But that this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution is settled beyond peradventure by previous decisions of this Court.*" (Italics ours.)

Differently expressed, counsel for the Government in that case in effect argued that the previous accumulating of profits by a corporation for the benefit of its stockholders was a taxable occasion or act and that it was appropriate for Congress to make the tax, so levied, payable when those accumulated profits became manifest through the declaration of a stock dividend. After realizing the futility of contending that a stockholder receiving a stock dividend thereby got income, counsel for the Government in that case sought to defend the tax as an excise or indirect tax, on the only other possible occasion for the tax, viz., the past act of accumulating. That act was seized upon by government counsel, but the court decided that a tax on the past act of accumulating was a direct tax.

This holding is directly applicable to the case at bar. If, as the *Macomber* case holds, a tax upon the past act of accumulating profits prior to the enactment of the taxing law is a direct tax, it follows in the case at bar that a tax upon a transfer of property, prior to the date of the law is also a direct tax.

In *Knowlton v. Moore*, 178 U. S. 41, 47 (1900), Chief Justice White quoted with approval the following French definition:

> "Direct taxes bear immediately upon persons, upon the possession and enjoyment of rights; indirect taxes are levied upon the happening of an event or an exchange."

Whatever may be said in favor of a tax upon a future optional disposal of one's property in a given way, it is a vastly different thing to tax the value of property disposed of *inter-vivos* in the past, simply because it was so disposed of. In the latter case, it is a tax on an essential attribute of property and therefore a tax on the property itself. If this be constitutional, why may not Congress place a tax on every one of us in respect of every house ever owned and lived in by any of us in the past?

In the case at bar, the tax was on a past transfer of the property. Certainly the right of disposition is one of the most fundamental rights of ownership and is the right which gives property its value. If a man could not dispose of his property in any way, his property would not be worth much. If a man were taxed for making any kind of disposition of his property, it would in substance be a tax on his property. This Court has recognized this in *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015 (1878), where it was held that a tax imposed by a Pennsylvania statute on the amount of sales made by an auctioneer was a tax on the property sold.

In *Nicol v. Ames*, 173 U. S. 509, 43 L. Ed. 786 (1899), a Federal law, taxing sales made at Boards of Trade or Exchanges, was held valid on the ground that the tax was on the privilege of using the special facilities for making sales. The court expressly recognized that a tax on all sales of property would be a property tax. In delivering the opinion, Mr. Justice Peckham said at page 521:

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

Under the holding of the above case, it is clear that a tax on all sales or transfers of property would be a direct property tax. A tax on future transfers similar to the transfer in this case would not be a property tax because the tax would be limited to a particular type of transaction. But when a past disposition of property, which was lawful and non-taxable when made, is the subject of the tax, the tax is not on any privilege but is a tax on the property, or, what amounts to the same thing, is a tax on the past act of exercising the right of ownership.

This all sounds rather technical but is really a simple matter of plain common sense. Congress cannot tax us simply because we own property or because we owned property several years ago. Now if Congress tries to tax us because at some time in the past we had walked into our own front door or had sold our property or had given it away, Congress would simply be using a roundabout way to tax the property. If this sort of tax were upheld, Congress could place a tax on all property ever owned or used in the past and could do the very thing which is forbidden by two different provisions of the Constitution.

We do not believe that under the guise of taxing a privilege, where the privilege is non-existent because exercised before the law was passed, Congress may evade the constitutional provisions. In the *Child Labor Tax case*, 259 U. S. 20 (1922), this Court refused to permit Congress under the guise of the taxing power to regulate the internal affairs of a state.

In the Pollock case, *supra*, at page 581, the Court said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and repre-

sentation so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls as has indeed been established by repeated decisions of this Court."

In *Dawson v. Kentucky Distilleries Co., supra*, at page 292, Mr. Justice Brandeis said:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents."

As said in *Kansas City Ry. Co. v. Botkin*, 240 U. S. 227, 235 (1916):

> "A tax may be in form a privilege tax and yet, in substance, may be a tax on property."

Unless the Government shall go counter to the principle that the substance and not the form is controlling, it may not brush aside the conclusion that the retroactive provisions of the 1918 Act impose a direct tax, by announcing that generically and historically death duties are and have always been regarded as indirect taxes and that therefore the tax under consideration is an indirect tax, and then cite *Knowlton v. Moore*, 178 U. S. 41 (1900), and *N. Y. Trust Company v. Eisner*, 256 U. S. 345 (1921), as authority.

The truth is, in our view, that the retroactive provisions of this law do not properly belong in a death duty statute at all. These provisions impose no death duties; they have nothing to do with death, except as death fixes a date for collection.

In the *Knowlton* case and in the *Trust Co. v. Eisner* case no question of retroactivity was present. *The language used in those cases had to do with prospective situations.*

The tax in neither of those cases was inevitable, as in the present case. In each case the taxpayers' volition had a chance to operate. In the *Eisner* case, last above, this fact is brought out by the observation of Mr. Justice Holmes as to the testator. He says at page 349, "He (the testator) knows the law and the consequences of the disposition that he makes." Again in the *Frick* case *(supra)*, at page 251, this Court said that the tax "would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways". These, we submit, constitute vital differences between those cases and the present case.

In the case at bar we have an absolutely inevitable tax. The 1918 law was not in existence when this trust was created. The situation was beyond recall years before the law was passed. The decedent did not know the 1918 Estate Tax Law because when she consummated her contract there was no estate tax law of any sort to be known. She neither knew nor could know either the law or "the consequences of the disposition" that she made.

We are here suggesting no departure from the doctrine of *stare decisis*. We do not believe any decisions of any Court of last resort have ever held constitutional a law similar to the retroactive provisions of this law. But we submit that regardless of how often other phases of this or any other similar statute may have been held to be constitutional, if a new state of facts be presented showing that the particular clause of the statute here under consideration may result in the infringement of a constitutional right of the latest litigant, the question must be examined in the light of the novel facts, and the constitutionality of the statute as applied to this situation determined.

Such cases as *Brushaber v. Union Pacific Ry. Co.*, 240 U. S. 1 (1915), upholding the validity of income tax

laws which are partly retroactive, are not authority for retroactive so-called *excise* taxes. Under the Sixteenth Amendment, Congress has power to levy income taxes, without apportionment, regardless of the fact of their being direct. *An income tax is the only direct tax which need not be apportioned.* We are not concerned here with the question of whether *permissible direct taxes*, viz., income taxes, may also be retroactive.

We have been considering the tax as one collected from the estate. Suppose a case where the estate is insufficient and collection is made from the beneficiary. In so far as the tax is collected from the beneficiary of life insurance or of a gift, it is clearly a direct tax. It has been expressly held that a tax on taking possession of one's own property is a direct tax; *Dawson v. Kentucky Distilleries Co., supra; Craig v. Taylor & Sons, supra; Thompson v. Kreutzer, supra; Thompson v. McLeod, supra.*

The celebrated New York case, *Matter of Pell*, discussed *infra*, is a convincing authority on this point.

In re Craig's Estate, 97 App. Div. 289, 89 N. Y. S. 971 (1904) (Affd. 181 N. Y. 551), involved a trust almost identical with the Reed trust. In holding the N. Y. statute taxing this trust unconstitutional, the Court said at page 296:

> "When the right is conferred by a lawfully executed grant or contract it is *property*, and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

If a tax on the privilege of taking possession of property already owned is a direct tax, *a fortiori*, a tax on the estate of a decedent who exercises no privilege at all in connection with the property is a direct tax.

If this tax on past transfers is valid, Congress can in effect levy a direct tax without apportionment on any and all property in this country simply by putting it in the form of a retroactive excise tax. For example, Congress could tax all foreign made goods now in this country by calling it an excise on the past importation or on the past purchase of imported goods. Or Congress could levy a tax on all real estate by calling it an excise on the last recorded transfer of every parcel of real property. Such taxes would be the very things which the framers of the Constitution sought to prohibit by two distinct provisions. But the substance of constitutional restrictions cannot be nullified by indirect means. *The Child Labor Tax Case, supra; Hill v. Wallace*, 259 U. S. 44 (1922). The direct tax provisions of the Constitution must be given some substantial meaning and effect. The test of absolute and unavoidable demand is the only test which conforms with history, with the adjudicated cases and with the purpose of these restrictions. Unless two express provisions of the Constitution are to be rendered meaningless and of no effect, there seems to be no escape from the conclusion that the tax in the case at bar is an unconstitutional direct tax.

These constitutional restrictions must be given some real effect. As said in *Pollock v. Farmers Loan and Trust Company, supra*, at page 583:

> "But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the nation and the

states of which it is composed, would have disappeared and with it one of the bulwarks of private rights and private property."

A late and illuminating opinion on this law as a direct tax is found in *Frew v. Bowers* (2nd Ct. C. C. A. 6-1-26), 12 F. (2nd) 625, where Judge Hough said, p. 628:

"Further, a tax on a transfer by A, but measured by anything other than the estate of A, may be a duty or excise in form, but it is a palpable effort to tax something other than the transfer. In this case the effort is to tax in 1922 in respect of something untaxable in 1910. Cf. *Lewellyn v. Frick*, 268 U. S. 238, at 251, 45 S. Ct. 487, 69 L. Ed. 934.

"If it is said that Congress might have taxed the 1910 transfer, and therefore can tax it even in 1922, the answer is that nothing of the kind has been attempted. There is no tax now laid on the transfer of 1910, nor the property transferred. Could Congress in 1922 have laid a tax on Mr. Nash because he gave away \$200,000 in 1910. If that be assumed as possible, it is not possible that the tax so laid, and computed on the gift, its credits and gains, could ever be an excise on the transfer.

"But if the tax be laid as it actually has been, and called an excise on the transfer of something else, the name is merely false, there is no excise, and the exaction falls into the category of unapportioned direct taxes. We think this an effort to use a constitutional power as a hook on which to hang a cloak that conceals unconstitutional action. There is no real difference between disguising this direct tax under the name of duty, and laying a tax in order generally to regulate some subject

taxable, but not otherwise subject to national regulation. The real purpose is dealt with, notwithstanding the cloak. The Child Labor Case, 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817, is the leading example.

"It follows that we think there was no 'interest' shown in Mr. Nash, justifying the tax laid; but, if the statute required the tax as laid, then the exaction was arbitrary and unconstitutional."

We submit that just as an income tax is a direct tax —a judicial conclusion upon which the states have now put the stamp of their approval through the ratification of the Sixteenth Amendment—so is a tax upon a past gift a direct tax and, unless apportioned, violative of the Constitution.

(B) THE RETROACTIVE PROVISIONS OF SECTION 402 OF THE 1918 FEDERAL ESTATE TAX LAW VIOLATE THE FIFTH AMENDMENT.

We shall contend in this portion of our brief that this tax on a past completed transfer of property amounts to an arbitrary exaction and operates to deprive the Coolidge Estate of property without due process of law.

In similar cases the Government has several times argued that the Fifth Amendment is not a limit on the taxing power of Congress, so a brief discussion may not be out of place.

We know of no actual decision of this Court holding that outside of the prohibition of export taxes and the requirements of apportionment of direct taxes, and of uniformity of indirect taxes Congress may act without restriction in taxation matters. A Federal tax law which afforded the taxpayer no opportunity to be heard, would certainly be held to be bad as a taking without due proc-

To the same effect are *Carrol v. Greenwich Ins. Co.*, 199 U. S. 401, 410 (1904), and *Ex Parte Kemmler*, 136 U. S. 436 (1889).

Nor is there any ground for saying that the taxing power of Congress is greater than that of the states. As pointed out by Mr. Justice Holmes in *Chanler v. Kelsey*, 205 U. S. 466, 480 (1907), the power of the states to impose death duties "is more unlimited than * * * the power of the United States to levy an inheritance tax". This is obvious because the power to impose death duties is based upon the power to regulate the devolution at death—a power resting exclusively in the states.

The vast weight of authority holds that retroactive inheritance tax laws of the states similar to the Federal act now under discussion are unconstitutional under the provisions of the Fourteenth Amendment as a taking of property without due process of law, or a taking of private property for public use without just compensation.

Matter of Pell, 60 N. Y. App. Div. 286, 171 N. Y. 48, is the leading case on this subject and is important for its holding that the tax was a direct tax as well as for its holding that the tax was unconstitutional. The testator died in 1863, creating by will a life estate followed by a remainder. The life tenant died in 1899 after the passage of a New York inheritance tax law expressly taxing all remainders which did not come into actual possession or enjoyment until after the passage of the act. It was undisputed that the remainders were expressly taxable under the statute. The appellate division of the Supreme Court recognized that the tax could not be sustained as an inheritance tax but held the tax to be valid as a direct tax, saying (60 N. Y. App. Div. at pp. 288, 290):

> "If we could conclude under the Transfer Tax Act, that nothing could be taxed but the right of succession, then it would follow in this case, as the

right to succession passed in 1863, that the property here involved was not taxable * * *. Here this tax must be supported, if at all, upon the theory that it is a tax upon property. * * *.

"What the legislature here intends is to tax property * * *. It could not very well tax the right of succession, for that had taken place years before the Tax Act was passed; and we think, therefore, that the tax can only be supported upon the principle that it is a tax on property."

On an appeal by the executor the Court of Appeals agreed with the lower court that the law was unconstitutional as a succession tax; the Court said (171 N. Y. 55):

"This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It therefore follows that, where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of a life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the transfer tax act, there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract, and take private property for public use without compensation."

But the Court reversed the judgment upon the ground that, as a matter of construction, the legislature did not intend to impose a direct tax and, therefore, the law could not be upheld as a direct tax.

At page 56, the Court said:

> "We are of the opinion that it is a violent presumption as to the intention of the legislature to construe an act, which is avowedly designed to tax the succession of property, on the death of its owner, as a direct tax."

The Court then held that even construed as a direct tax it would be invalid.

In re Craig's Estate, supra, involved a transfer intended to take effect at death executed years before the taxing law was passed. In holding the tax unconstitutional, the court said (97 App. Div. 296):

> "The underlying principle which supports the tax is that such right is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question; and when the right is conferred by a lawfully executed grant or contract it is property, and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

In *Hunt v. Wicht,* 174 Calif. 205, *supra,* the decedent made a conveyance of land to his wife, placing the deed in escrow for delivery upon his death. After the deed was made, and prior to the decedent's death, a retroactive statute was passed taxing transfers intended to take effect in possession or enjoyment at or after the grantor's death. Chief Justice Angellotti said (p. 208):

"We have then the case of a grant of land so executed and delivered on April 12, 1905, as to be fully operative and effective on that date to vest a *present title* in the grantee, subject only to a life interest in the grantor; 'an executed conveyance' (*Estate of Cornelius*, 151 Cal. 550) of this property in fee simple absolute, subject only to this life interest. Could the legislature subsequently lawfully impose a succession tax upon this fully executed *transfer of title*, such tax accruing at the termination of the grantor's reserved life estate, simply because in the meantime the grantee was debarred by the intervening life estate from actual possession of the property conveyed and the other incidents of a life estate? It appears to us that to state the question is to answer it. The succession to the property by the grantee which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate. The whole estate conveyed vested irrevocably in interest at once, notwithstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. His death added nothing to the title theretofore acquired by the grantee, and *there was no transfer of any property in any legal sense at the time of such death*, or at any time subsequent to the delivery in escrow. The right of the grantee to have actual physical possession of the property itself and enjoyment of the other incidents of an estate for life upon the death of the life tenant was absolutely vested by the delivery of the deed in escrow, and nondefeasible, and the legislature could not thereafter lawfully destroy, impair, or burden this property right under the guise of a succession tax on account of the transfer." (Italics ours.)

Lacey v. State Treasurer, 152 Iowa 477, 132 N. W. 843 (1911), held unconstitutional a retroactive tax on a transfer intended to take effect in possession at death. The court said (p. 483):

> "If the right to the property passed by the conveyance beyond the control of the grantor, it was a vested right; it was not a mere expectancy, like the prospective right of an heir, or the inchoate right of a wife, and it was therefore not subject to burdens which the legislature might attempt to impose by retrospective laws. * * * Any attempted legislation imposing a collateral inheritance tax upon interests in remainder, which have become vested * * * would be unconstitutional."

State v. Probate Court, 102 Minn. 268, 113 N. W. 888 (1907), was a similar holding. The court said:

> "That law is prospective in its operation, and it is beyond the power of the state, even if it so desired, to subject to its operation property which the owner in good faith disposed of before his death."

In re Houston's Estate, 120 Atl. 267, 276 Pa. 330 (1923): in 1918 decedent and her husband created a trust, reserving life estates to themselves with a remainder to one Freeman. Prior to decedent's death the Pennsylvania inheritance tax law was amended so as to increase the rates of tax. The lower court held that this trust fund could not be taxed at the higher rate. The Supreme Court simply quoted the opinion below, affirming it. This opinion says:

> "The claim of the commonwealth to tax this trust estate at 10 per cent., under the Acts of June 20, 1919 (P. L. 521; Pa. St., 1920, § 20465 et seq.),

and May 4, 1921 (P. L. 341), is not supported by the authorities, nor is it agreeable with just principles of taxation. The grantor in the deed parted with her title before the passage of either of these acts of assembly. She reserved no right of revocation, nor did she retain the right of control; for her power exerciseable jointly with the trustee to change investments is a very different thing; the terms of the trust were unchangeable. The deed was not executed with any intent to defraud the commonwealth or to evade the law, nor was it made in such contemplation of death as to bring it within any applicable decision. As soon as the deed was executed, Freeman had a vested right in the property, only defeasible in case of his death (which has not occurred), when it would pass under his will, and his prospective right would have passed by his assignment to others. Serrill's Estate, 15 Wkly. Notes Cas. 470; Wickersham's Appeal, 18 Wkly. Notes Cas. 36. * * *

"Nor can it be successfully argued that the tax is not on the transfer of title to the property, but on the transfer of enjoyment, for, as it seems to us, the act means by this the right of enjoyment, and this was vested under the deed. If the tax is imposed when enjoyment is perfected by actual possession, and this theory is carried to its logical conclusion, it would seem that, if during the administration of an estate delays occur, as they necessarily must, and if before actual distribution is made the rate of taxation is changed, a legacy would be taxed at the changed rate, which would appear to be a reductio ad absurdum."

In re Lansing's Estate, 182 N. Y. 238, 74 N. E. 882 (1905), is a similar holding. The Court said:

"The law sanctioned the gift of Mr. Suffern when it was made, and the law cannot cut down the gift by imposing a transfer tax when there was no transfer."

People v. Trust Company of America, 205 N. Y. 74, 98 N. E. 207 (1912). The New York law imposed a tax on future advances made under existing mortgages. The state sought by this suit to collect a tax from the mortgagees on additional bonds issued under the terms of a mortgage executed before the law was passed. In holding the tax invalid, the Court said:

"The legislature could not impose a tax upon the defendant for a transaction which at the time it was effected was subject to no tax."

To the same effect are the following cases:

Miller v. McLaughlin, 141 Mich. 425; 104 N. W. 777 (1905);

Commonwealth v. Wellford, 114 Va. 372; 76 S. E. 917 (1913);

In re Vanderbilt's Estate, 172 N. Y. 69; 64 N. E. 782 (1902);

In re Lyon's Estate, 233 N. Y. 208; 135 N. E. 247 (1922);

In re Felton's Estate, 176 Cal. 663; 169 Pac. 392 (1917);

State v. Safe Deposit & Trust Co., 132 Md. 251; 103 Atl. 435 (1918);

In re Hitchin's Estate, 97 App. Div. 634; 89 N. Y. S. 1106 (1904);

In re Ripley's Estate, 122 App. Div. 419; 106 N. Y. S. 844 (1907);

In re Haggerty, 128 App. Div. 479; 112 N. Y. 1017 (1908);

In re Chapman, 133 App. Div. 337; 117 N. Y. S. 679 (1909);

In re Smith, 150 App. Div. 805; 135 N. Y. S. 240 (1912);

In re Webber, 151 App. Div. 539; 136 N. Y. S. 83 (1912);

Commonwealth v. McCauley's Executors, 166 Ky. 450; 178 S. W. 411 (1915);

Eury's Executors v. State, 72 Ohio St. 448; 74 N. E. 650 (1905).

The *Pell* case has been cited and followed innumerable times by the courts of New York and other states and its authority has never been weakened. The case was cited with approval by Mr. Justice Holmes in *Chanler v. Kelsey, supra.* This was a dissenting opinion concurred in by Mr. Justice Moody but the portion of the opinion which we quote was in no way contrary to the decision of the majority of the court. In this opinion, Mr. Justice Holmes said at 51 L. Ed. 889:

> "If, then, a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the state court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the state; and as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the

continuing of the state's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the 14th Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. Re Pell, 171 N. Y. 48, 55, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; Re Seaman, 147 N. Y. 69, 41 N. E. 401."

The *Pell* case was also cited with approval in another Federal case entitled *Blair v. Harold*, 150 Fed. 199 (1904). In that case the decedent had entered into a partnership with his son and three other persons. Decedent's share in the partnership was to pass to his son on decedent's death. After the partnership agreement had been entered into and shortly before the decedent died, Congress passed the Act of 1898 which imposed an inheritance tax on transfers intended to take effect at death. The Government taxed the son the share in the partnership which he received by the decedent's death and suit was brought to recover the amount of this tax. The Circuit Court held that the tax was illegal, Judge Cross saying at page 205:

* * * "My conclusion upon this branch of the subject, therefore, is that the partnership agreement was an irrevocable self-executing contract; but whether self-executing or not, upon its delivery DeWitt C. Blair, had vested rights thereunder in the interest of John I. Blair in the partnership property, defeasible only upon the survivorship of John I. Blair, beyond the partnership period, which rights could not be divested by him by will or otherwise. Such being the case, the tax imposed thereon was unwarranted and illegal."

This decision was affirmed by the Circuit Court of Appeals for the Third Circuit, 158 Fed. 804 (1907). At page 806 Judge Dallas said:

> "It cannot be supposed that this partnership agreement was designed to circumvent a statute enacted several years after it was made. It was entered into in good faith, and the rights of the plaintiff then accrued. As was said by the learned District Judge, 'they were absolute and irrevocable so far as the parties were concerned, and were contingent only upon the happening of an event which did happen'. They were acquired by contract, and not by gift made by last will and testament, or otherwise."

Most of the above cases dealt with inheritance rather than with estate taxes; taxes on the right to receive rather than on the right to transmit. By analogy the even more arbitrary exaction from the decedent's estate is *a fortiori* invalid. The reasoning of the above cases that there can be no succession tax where there is no succession is directly applicable to the case at bar.

In *Knowlton v. Moore, supra*, speaking of death duties, the Court said at page 78:

> "Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed."

In *Wardell v. Blum*, 276 Fed. 226 (1921), the Circuit Court of Appeals of the Ninth Circuit, in holding that a wife's share in community property was not taxable as a part of her husband's estate under the 1916 Federal Law, said at page 227:

> "All inheritance taxes are imposed on the transfer of the net estate of the 'deceased', from which the conclusion is inevitable that the property upon which such a tax is imposed must, in truth, be the property of the deceased."

These authorities are directly applicable to the present case where the property taxed did not pass at death, was not a part of the decedent's estate and, in fact, had been disposed of long prior to the decedent's death.

The following Federal authorities are pertinent to this discussion.

Chase v. U. S., 222 Fed. 593 (1915). Indian land was realloted pursuant to an act of Congress. In holding that this act was unconstitutional and could not impair the rights of the original allottee, Judge Sanborn of the 8th Circuit Court of Appeals said:

> "No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed."

Wagoner v. Evans, 170 U. S. 588, 42 Lawyers' Ed. 1154 (1898). A Territorial Law of March 5, 1895, authorized counties in Oklahoma to collect taxes upon personal property kept on Indian reservations within the county limits. Defendants, acting under an Oklahoma law, attempted to collect taxes on cattle in the Indian reservation for 1892, 1893, 1894 and 1895. Plaintiff sued to enjoin defendants from collecting taxes except for the year 1895 and thereafter. Both parties appealed.

Affirmed. In delivering the opinion, Mr. Justice Shiras said (42 L. Ed. 1156):

> "It remains to consider the appeal of the taxing authorities of Canadian county.

"They object, in the first place, to that portion of the decree below which restrains them from the collection of taxes for the year 1892, 1893, and 1894. They point to a provision contained in the act of March 5, 1895, enabling the special assessor to assess or reassess property that at any time has, by oversight or negligence, or for any other cause, escaped taxation; and they contend that the act of 1895 was an amendatory statute, and intended to cure a supposed defect in the then existing laws, and cases are cited in which it has been held that such curative statutes can have a retroactive effect, and enable the authorities to assess and collect taxes on property which should have been theretofore assessed.

"It is sufficient to say that, prior to the passage of the act of March 5, 1895, there existed no power in the authorities of Canadian county to tax property within the attached reservation. Such authority was first given by that act, and could only be validly exercised on property subjected to its terms after its enactment."

The impropriety of reaching back into the past to make past transactions bear the burden of Government is well illustrated by the case of *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U. S. 338, 66 L. Ed. 647 (1922). The state of Florida unlawfully collected a toll from plaintiff for passage through a canal lock. Thereafter a law was passed purporting to validate the collection of the toll. Plaintiff sued to recover the amount collected from him and claimed that the law violated the 14th Amendment. The Supreme Court reversed a judgment in favor of the state. Mr. Justice Holmes said at page 339:

"* * * if the legislature of Florida had attempted to make the plaintiff pay in 1919 for passage through the lock of a canal that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls."

In *Frew v. Bowers*, *supra*, the opinion of Judge Hand, p. 630, goes expressly on the ground that Sec. 402 (c) violates the 5th Amendment.

(C) THE RETROACTIVE PROVISIONS OF THE 1918 ESTATE TAX LAW VIOLATE THE FUNDAMENTAL CONCEPTIONS OF FREE GOVERNMENT.

There has grown up in the decisions of this Court, and other courts, a group of pronouncements to the effect that there are certain things that the legislative body may not do simply because they are too arbitrary, too unreasonable, too unthinkable to be sanctioned by the fundamental and guiding principles of civilized society. We believe that these pronouncements may be properly classified as a body of principles formulated under that wisely elastic phrase "due process of law", but for the purpose of emphasis we shall discuss them under the foregoing heading.

The existence of such a limitation on constitutional power has been recognized in the following cases:

Calder v. Bull, 3 Dallas 386 (1798);

Osborn v. Nicholson, 13 Wall. 654 (1872);

Terrett v. Taylor, 13 U. S. 43 (1815).

Retroactive laws have long been recognized as arbitrary in character. In *Shwab v. Doyle, supra*, this Court expressed itself in no uncertain terms regarding retroactive laws when it quoted with approval the following language of Justice Story (page 534):

> "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."

This was said in answer to the Government's contention that the 1916 Estate Tax Law be given a retroactive effect.

When we come to the subject of taxation, the unconstitutionality of arbitrary laws may be placed upon an additional ground. The taxing power of Congress is a granted power. It embraces only contributions for the support of the Government and only such of these contributions as come within the conception of taxation. Thus the power of eminent domain and the power to requisition supplies in war time are not embraced within the meaning of taxation. In the *Pollock* case, *supra*, Mr. Justice Field said at 157 U. S. 599:

> "But there are other considerations against the law which are equally decisive. They relate to the uniformity and equality required in all taxation, national and state; to the invalidity of taxation by the United States of the income of the bonds and securities of the states and of their municipal bodies; and the invalidity of the taxation of the salaries of the judges of the United States courts.
>
> "As stated by counsel: 'There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations, as he justly observes, of its powers

arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations.' Citizens Sav. L. Asso. of Cleveland v. Topeka, 87 U. S. 20 Wall. 655 (22:455), and Parkersburg v. Brown, 106 U. S. 487 (37:238)."

"The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax.

"This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress. The law, as we have seen, distinguishes in the taxation between corporations by exempting the property of some of them from taxation and levying the tax on the property of others when the corporations do not materially differ from one another in the character of their business or in the protection required by the government. Trifling differences in their modes of business, but not in their results, are made the ground and occasion of the greatest possible differences in the amount of taxes levied upon their income, showing that the action of the legislative power upon them has been arbitrary and capricious and sometimes merely fanciful."

Attorney-General Olney and Assistant Attorney General Whitney, in their argument in the *Pollock* case, ad-

mitted this inherent limitation on the general taxing power. See 157 U. S. at page 507, and 157 U. S. at page 474, where Mr. Whitney said:

> * * * "there is, however, a certain degree of uniformity involved in the very word 'tax'; a uniformity requirement involved in the definition of that word and guaranteed by the Fifth Amendment to the Constitution. * * * A special tax cannot be laid upon A simply because he is A and not B. Such a law would be an attempt to exercise not a taxing power, but the power of eminent domain, and would require compensation for the property taken. Thus the constitution of Pennsylvania provides that taxes shall be 'uniform on the same class of subjects'; while the Supreme Court of that State has decided that this requirement is merely declaratory. *Kitty Roup's Case*, 82 Penn. St. 211."

Cooley on Constitutional Limitations (7th Ed), at page 695 says:

> "Having thus indicated the extent of the taxing power, it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast, that everything which may be done under pretense of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government."

Cooley says on page 41 of his work on Taxation:

> "Vast as is the power of the government to levy taxes upon its citizens, there are nevertheless limitations upon it of a very distinct and positive character, which inhere in the very nature of the power itself. Some of these limitations are commonly declared in the written constitutions, but the declaration is rather from abundant caution than from necessity, as the limitations are equally imperative whether thus declared or not."

In *Savings & Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455 (1874), in speaking of the taxing power, Mr. Justice Miller said at 22 L. Ed. 461:

> "There are limitations on such power which grow out of the essential nature of all free governments."

The Child Labor Tax Case, *supra*, is a striking illustration of the inherent limitations of the taxing power.

ARBITRARY FEATURES OF THE TAX.

One of the worst features of the tax involved in the case at bar is that it amounts to making A pay a tax on B's property. Is such an exaction within any conceivable meaning of the word *taxation?* Even if it falls within this power of taxation is it not so arbitrary as to be unconstitutional? There can be but one answer to these questions.

U. S. v. Baltimore & Ohio R. R. Co., 84 U. S. 322, 21 L. Ed. 597 (1873). This suit was brought to collect a tax on interest paid to the City of Baltimore on money advanced to aid the construction of the railroad. The tax was to be collected from the railroad and deducted from the interest paid to the City. In holding that this tax

was unconstitutional because really laid on the City, Mr. Justice Hunt said (21 L. Ed. 599):

> "A tax is understood to be a charge, a pecuniary burden, for the support of Government. Of all burdens imposed upon mankind that of grinding taxation is the most cruel. It is not taxation that Government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the Government from his own gains and of his own property."

In *Hartman v. Greenhow*, 102 U. S. 672 (1881), the question was as to the validity of a statute requiring a tax on bonds to be deducted from coupons payable to bearer, where the coupons had been originally attached to the bonds, but had later been separated and were held by a different owner. The court, speaking unanimously by Mr. Justice Field, said (p. 684):

> "And surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another."

If it is not legitimate to require the holder of a coupon to pay the tax levied upon a bond with which it once at least was connected, it surely is not legitimate to require the executor of an estate to pay the tax upon property which has no connection whatever with the estate.

In the oft quoted passage from the *Knowlton Case*, Chief Justice White said at 178 U. S. 76:

"The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth $1,000, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundred fold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus a person dying and leaving an estate of $10,500, bequeaths to a hospital $10,000. The rate of tax would be five per cent, and the amount of tax $500. Another person dies at the same time, leaves an estate of $1,000,000 and bequeaths $10,000 to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax $1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other."

And at page 77:

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not

transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

A similar tax was held unconstitutional in *Black v. State*, 113 Wis. 205; 89 N. W. 522 (1902), and in *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 579 (1895).

The statute under consideration in the present case provides that the tax may be collected from the transferee if there are insufficient funds in the hands of the executor. Where the tax is collected from the transferee exactly the same situation arises that was condemned in the three cases last cited. Since the tax cannot constitutionally be collected from the transferee, the scheme of taxation provided by Congress fails and it is extremely doubtful whether the statute could be partially upheld so as to justify a retroactive tax collected from the executor, as in the present case. However, we give no further consideration to this point because the tax is equally bad when collected from the estate.

To compel executors to pay a tax in respect to property which is not, and never has been, a part of the estate under administration, of which the executors have never had possession or title, and with which the decedent long since parted, and which property was vested in third persons, amounts to nothing more or less than making A pay a tax on property owned by B.

One of the most unfair features of this tax is the fact that it is figured on the value of the property on the date of death. This makes the tax in the Reed case almost double what it would be if it were based on the value of the property at the time of the transfer which is taxed. The Supreme Court of California in *Chambers v. Lamb*, 186 Cal. 261, 199 Pac. 33 (1921), held that this could not be done. The case involved a transfer made in

contemplation of death after the passage of the state inheritance tax law. At decedent's death, the property was of much greater value. The statute does not seem to have made it absolutely clear whether the property was to be valued at the date of death. The Court held that the property must be valued at the date of the transfer. Judge Lennon in delivering the opinion said at page 34:

> "Concisely stated, the basis for the measurement of the tax is the market value of that which changes hands as the result of the act of transfer. Applying these provisions and definitions to the instant case, the tax is imposed upon the market value of the real property passing by the deed of William D. Lamb. $194,775 was the value of the property which thus passed to the transferee. While the property had attained the value of $212,775 at the time of the death of the transferor, the additional $18,000 was not part of the value of the property 'passing' from the grantor to the grantee; it was an increase in value subsequent to the transfer and during a period when the transferee was the owner thereof. The value of the property passing between the parties being the basis for the tax, the increase in value after the actual vesting of rights under the transfer is not to be rated as part of the taxable value."
>
> "The fact that the tax is 'due and payable' upon the death of the transferor is not inconsistent with the rule that the liability for the tax attaches whenever the transfer is completed. The imposition of a tax and its maturity are commonly regarded as distinct and separate stages in the process of taxation."

This case shows the absolute absurdity and inconsistency in the present method of valuation.

One or two hypothetical cases may help to illustrate the injustice of the statute under consideration.

Suppose a farmer in Texas in 1907 had conveyed to a trustee land at that time worth $10,000, and had reserved to himself the income therefrom for life with the remainder over to an invalid nephew. Thereafter the farmer accumulated for his wife and children property worth $100,000 and died after the passage of the 1918 Estate Tax Law. In the meantime, the land placed in trust has been found to contain oil and is worth $2,000,000 at the time of his death. Applying the law as it has been applied in the case at bar, the farmer's gross estate would be valued at $2,100,000, $50,000 would be exempted and assuming no debts or other deductions, his net estate would be $2,050,000. The estate tax would amount to approximately $160,000. This would take all the property in the hands of the executor and leave a deficit of $60,000 to be collected from the nephew or the trustee. The farmer's wife and children would be left penniless as a result of this retroactive taxation.

> See *Miller et al. v. U. S.*, U. S. Ct. of Cl., No. D-809 (6-14-26).

Vary the foregoing case by the assumption that the trustee, shortly after receiving the conveyance of the land and before the discovery of oil, sold this land and, under his power to reinvest, bought $10,000 worth of government bonds. Let the other facts remain the same. In this instance, all the property left in the estate would be applied on the tax, the nephew would have to give up to the Government the value of the Government bonds and, under the literal wording of Section 409, both the trustee and the nephew would be personally liable for the $50,000

balance of the tax. The fortuitous jump in values, inuring solely to the benefit of the man who purchased these lands from the trustee, would result through the retroactive application of this tax law in this incredible injustice.

As we have shown heretofore in this brief, the Government has at different times used two different methods of computing the tax. In the case at bar, the tax was figured on the value at the date of decedent's death of the property originally put into the trust although some of that property had been disposed of by the trustee prior to the decedent's death. Clearly the property which had been disposed of and was not in the trust fund at the time of the decedent's death could have no possible relation to the transfer of property at decedent's death or to the decedent's estate. If that property had been sold by the trustee to John Doe and had thereafter greatly increased in value the estate would, nevertheless, have to pay a tax based on John Doe's good fortune. This method of computing the tax is the method which the statute prescribes in clear terms.

On the other hand, in the Reed case the tax was computed on the value at the date of decedent's death of the property at that time in the trust fund although some of this property had never been owned or transferred by the decedent but had been purchased by the trustee. Is there any possible reasoning by which an estate tax or any other kind of transfer tax can be based on property never owned or transferred?

A consideration of the actual effect of computing the tax on the increased value at the date of death brings to light all the inconsistencies, absurdities and injustice of this tax. The value has no relation whatever to the object of taxation.

It is immaterial whether such an exaction be termed a confiscation rather than a tax, or be held to violate the Fifth Amendment, or be held a violation of "Those fundamental conceptions of free government which underlie all constitutional systems." (*Knowlton v. Moore*, 178 U. S. 41, 77.) In any event, it is an unreasonable and unwarranted exercise of legislative power and not the legitimate use of the taxing power.

III.

SECTION 402 (c), REASONABLY CONSTRUED, DOES NOT APPLY TO TRANSACTIONS TAKING PLACE PRIOR TO THE 1916 ESTATE TAX LAW.

As previously stated, we believe that the constitutional questions are conclusive in this case. We recognize, however, that this Court has uniformly sought to avoid the necessity of passing upon the constitutionality of acts of Congress by seeking out some ground for construing a statute so as not to raise the question of constitutionality.

In recognition of this established attitude on the part of this Court, we submit that, reasonably construed, the section of the 1918 Statute under discussion may be held to be retroactive only so far back as September 9, 1916, the date of passage of the 1916 Act. The Court will bear in mind that under the facts before it in the case at bar, all the gifts to the trust were completed before the 1916 estate tax law was passed. By the construction we are suggesting, we do not wish to be understood to argue that such construction would obviate constitutional difficulties in a case where the gifts took place after September 9, 1916, but before the passage of the 1918 law. That situation, however, is not now before the Court and

may be dealt with when it arises. So far as the case at bar is concerned, the construction we are suggesting makes wholly unnecessary the determination of any constitutional question.

We have shown that the first estate tax statute to be enacted by Congress was that of 1916; that from and after the date of its enactment, for the first time, citizens of the United States were actually or constructively put on their notice as to this new taxation policy of the Federal Government. Any man giving away or willing away his property after that date did so with a knowledge of what his acts might involve. The *Shwab* case determined that that statute was only *prospective* in its operation.

When Congress came to pass the 1918 estate tax law, it used the following language in Section 401:

> "That (*in lieu* of the tax imposed by Title II of the Revenue Act of 1916, as amended, and *in lieu* of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum," etc.

This language links the 1918 statute to the 1916 statute and was used by Congress prior to the decision of this Court in the *Shwab* case; therefore it could not have been inserted for the purpose of getting away from the effect of the decision of this Court.

The 1918 Statute contained two new paragraphs. These are Sec. 402, (e) and (f), and read as follows:

> "(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

"(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

Paragraphs (e) and (f) of Section 402 were not in the 1916 law and in spite of the fact that the retroactive language in Section (c), i. e., "whether such transfer or trust is made or created before or after the passage of this Act", was first inserted in Section (c) when it was re-enacted in 1918, such retroactive language was not put in either Section (e) or Section (f). It is also to be noted that Sections (e) and (f) were evidently inserted for the purpose of closing other possible channels for evading the estate tax law, just as Section (c) was originally placed in the 1916 law for a similar purpose.

It is, therefore, obvious that as to the new transactions, such as those covered by Sections (e) and (f), Congress intended no retroactivity (see *Lewellyn v. Frick*); that is, Congress did not make any express retroactive provisions covering any items made taxable for the first time. But as to transactions such as those covered by Section (c), it intended some retroactivity. The reasonable inference is that when Congress put in express retroactive language to cover transactions taxable under an earlier law and at the same time omitted retroactive language covering transactions made taxable for the first time, Congress did not intend to reach transactions effected at a time when they were non-taxable. In other words, Sections (e) and (f), covering new subject matter and operating only prospectively, needed no retroactive language, whereas Section (c), which had been in effect since September, 1916, required it.

The chief injustice of retroactivity, upon which we have dwelt at length in the earlier portions of this brief, is obviated if Section 402 (c) be made retroactive only to September, 1916, because from and after that date prospective taxpayers had their warning. If the retroactive scope be limited to 1916, the most odious feature of retroactivity is eliminated—the tax does not "impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways." (*Lewellyn v. Frick.*) Not so if it be given a greater retroactivity.

This Court itself has expressed doubt as to the limits of retroactivity of such a statute. In *Shwab v. Doyle*, this Court held that the 1916 law was prospective, basing its decision partly upon the ground that if retroactivity were conceded it was doubtful how far back it would go. On this point the Court said at page 535:

> "The circumstances of this case impel to such selection. *If retroactivity be accepted, what shall mark its limit?*" (Italics ours.)

When it is noted that the 1916 law used the words "*has at any time made a transfer*", it is apparent that the Court was not merely adopting the literal meaning of the words of the statute, but was applying legal rules of construction to reach a reasonable result.

To concede indefinite retroactivity, a construction for which Government's counsel contended, is so shocking to one's sense of fairness and justice that a construction should certainly be sought which will avoid any such conclusion.

Under Section 402 (c) of the 1918 Act it is possible to find a limit preventing unreasonable retroactivity by adopting the date of enactment of the 1916 Act as a break date. This does no violence to the statutory language—

it gives a meaning to it, but confines its operation within reasonable limits.

We shall now call attention briefly to certain rules which this Court has from time to time laid down. They have been repeatedly enunciated, but we select only a few typical cases:

First, in cases of doubt, taxation statutes shall be resolved in favor of the taxpayer and against the Government.

Second, retroactive laws are abhorrent, and if possible a retroactive construction will be avoided.

Third, in order to avoid the necessity of passing upon the constitutionality of an act of Congress, the courts will resort to a reasonable, as opposed to a literal, construction of the statute.

In *Gould v. Gould*, 245 U. S. 151, it was held that alimony did not come within the terms of the items described as "income" in the Income Tax Act of 1913. Mr. Justice McReynolds stated in the opinion, at p. 153:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. *In case of doubt they are construed most strongly against the government, and in favor of the citizen.*" (Italics ours.)

In *Reynolds v. M'Arthur*, 2 Peters 417 (1829), at page 434, Marshall, C. J., said:

> "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forward, not backward; and are never to be construed retro-

spectively *unless the language of the Act shall render such construction indispensable.*" (Italics ours.)

To construe the parenthetical language in Section 402 (e) as reaching back seventeen or seventy years is certainly not an "indispensable" construction.

In delivering the opinion in *Southwestern Coal & Improvement Co. v. McBride*, 185 U. S. 499 (1902), Mr. Justice White, at page 503, says:

> "We adopt the reasoning of the court below on the subject. The court said (43 C. C. A. 652, 104 Fed. 473):
>
> "'The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens *in the future*. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and, assuming the legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract *unless it is so framed as to preclude any other interpretation*.'" (Italics ours.)

Can it be said that the language in Section 402 (e) precludes the interpretation we have suggested, i. e., that the retroactivity be limited to the period subsequent to September 9, 1916? Our suggested interpretation gives some meaning to the word "before". It does no violence to that language.

Union P. R. R. Co. v. Laramie Stock Yards Co., 231 U. S. 190, 58 L. Ed. 179 (1913) involved ejectment to recover land which was part of plaintiff's right of way. Defendant claimed as adverse possessor for the period required by the state law. The land was not originally

subject to adverse possession because the fee was in the United States, but in 1912 Congress passed a law providing:

> "That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporations or either of them, or the successors or assigns of any of them, by or through adverse possession of the character and duration prescribed by the laws of the state in which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee instead of being granted as a right of way."

Plaintiff claimed that this statute was not retroactive and, if so, was unconstitutional.

On demurrer to the answer, judgment was given for defendant. Reversed on the ground that the statute should not be construed to be retroactive.

Mr. Justice McKenna said at 231 U. S. 199:

> "Construction, therefore, becomes necessary, and the first rule of construction is that legislation must be considered as addressed to the future, not to the past. *The rule is one of obvious justice, and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed.* The rule has been expressed in varying degrees of strength, but always of one import, that a *retrospective operation will not be given* to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be 'the unequivocal and *inflexible* import of the terms, and the manifest intention of the legislature'." (Citing cases.) (Italics ours.)

At page 200 he said:

"In *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737, the questions we are now discussing came up for consideration. We there expressed, in considering a statute of limitations whose literal interpretation would have had the effect of making it applicable to actions which had accrued prior to its passage, the rule against retrospective operation—the injustice and unconstitutionality of it. We said that a statute of limitations may affect actions which have accrued as well as those to accrue, and 'whether it does or not will depend upon the language of the act and the apparent intent of the legislature to be gathered therefrom.' But it was said that, *even against a literal interpretation* of the terms of the statute, 'it will be presumed that such was not the intent of the legislature. *Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective operation.*'" (Italics ours.)

Union Pacific R. Co. v. Snow, 231 U. S. 204, 58 L. Ed. 184 (1913), was a companion case to *U. P. R. Co. v. Laramie Stock Yards Co.*, and involved the same question. In holding that the statute should not be construed to be retroactive, Mr. Justice McKenna said, at 231 U. S. 213:

"*Courts will not*, as we have seen, *enforce a literal interpretation when by doing so antecedent rights are affected or human conduct given a consequence it did not intend.* Such a purpose the courts refuse to assign to the legislature unless compelled by language explicit and imperative. And we have pointed out that we are repelled from so doing by grave doubts of its legality as well as of its justice. These considerations need not be

further expanded. Their strength has been pointed out and their sufficiency to *prevail over a literal interpretation* of a statute." (Italics ours.)

It is obvious from the last two cases cited that a literal interpretation does not bind the courts where such literal interpretation raises serious constitutional questions. In *Lewellyn v. Frick, supra*, Mr. Justice Holmes said, at page 251:

> "Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind."

The established practice of this Court to avoid giving to a statute a construction which involves constitutional difficulties was only recently again affirmed by Mr. Justice Van Devanter in *Panama Railroad Co. v. Johnson*, 264 U. S. 375 (1924), as follows (p. 390):

> "But, as this Court often has held, 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score'."

In *Knowlton v. Moore*, 178 U. S. 41, at page 77, the Court said:

> "We are therefore bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

In *U. S. v. Kirby*, 74 U. S. 482, 19 L. Ed. 278 (1868), the holding of the case is shown in the following language of Mr. Justice Field at 19 L. Ed. 280:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or

an absurd consequence. It will, always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter.

"The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, 'That whoever drew blood in the streets should be punished with the utmost severity', did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the Statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt'. And we think that a like common sense will sanction the ruling we make, that the Act of Congress which punishes the obstruction or retarding of the passage of the mail, or its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."

We find the "rule of reason", so-called, in the matter of statutory construction applied by this Court in the celebrated cases of *Standard Oil Company of New Jersey v. United States*, 221 U. S. 1 (1910) and *United States v. American Tobacco Co.*, 221 U. S. 106 (1910), and in the earlier case of *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892). In the last named case, the court was passing upon the statute prohibiting the importation of aliens under contract to perform labor and the question was whether or not this statute should be applied to an English clergyman who had come to serve a New York church under contract. Mr. Justice Brewer, at page 227 of 36 L. Ed., said:

"It must be conceded that the act of the corporation is within the letter of this section."

After stating the argument, the Justice goes on to say:

"It is a familiar rule that a *thing may be within the letter of the statute and yet not within the statute*, because not within its spirit, nor within the intention of its makers." (Italics ours.)

And later on he says:

"As said in Plowden, 205: 'From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it; and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances.' "

And at page 229:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

It was obviously the purpose of Congress by the enactment of Section 402 (c) both in its 1916 and its 1918 forms to preclude evasions of the law. There could be no evasion prior to September 9, 1916, because before that date there was no law to evade. This purpose is fully accomplished by construing the 1918 form of the section as retroactive back to, but not prior to, September 9, 1916, and it avoids the unjust interpretation thereof which would be contrary to the canons of statutory construction outlined above.

The construction we have suggested, therefore, gives heed to the rules, first, that doubts should be resolved against the government and in favor of the taxpayer; second, that retroactive construction should be avoided unless no other reasonable construction can be found; third, that the literal construction need not be adopted where a reasonable construction will obviate the necessity of deciding grave constitutional questions. The construction we have urged gives some meaning to the retroactive parenthetical clause. When carefully considered, the cases of *Shwab v. Doyle* and *Lewellyn v. Frick* clearly sustain such a construction. A hasty perusal of the statute may leave at first the impression that the retroactivity of the statute is unlimited, but a more careful consideration shows that the construction for which we contend is not only consistent with the wording of the statute, but conforms to the legislative intent and is, in fact, the most reasonable construction which can be adopted. It does no violence to language and, as applied to the facts in the case at bar, avoids a harshness and an injustice from which the courts must shrink.

CONCLUSION.

Literally construed the Statute forces upon the Court the determination of its constitutionality. We have shown that the constitutional questions may be avoided by the adoption of a reasonable construction of the statute.

The provisions of the 1926 Federal Estate Tax Act when applied literally to a situation such as that presented by the Reed case or the Coolidge case, impose taxes upon transfers and gifts completed before the enactment of the law. The tax is absolute and unavoidable. It leaves open to the taxpayer no option of creating or of foregoing the creating of a taxable situation. It taxes him merely because of the past exercise of one of the attributes of the ownership of property. It therefore falls in the category of direct taxes and being unapportioned is unconstitutional.

These retroactive provisions impose consequences upon the legitimate, prior acts of men utterly beyond their possible contemplation. As a result, property is taken under the guise of taxation and taken in a way which violates the fundamental conceptions of organized society. We contend that this is a taking in violation of the Fifth Amendment of the Constitution.

For some good reason the Almighty dropped a curtain before our eyes and concealed the future from us. The whole scheme of human life is worked out on this basis. This has its advantages and its apparent disadvantages, but regardless of the theoretical preponderance one way or the other, the fact is we cannot successfully peer into the future. Political institutions and man-made laws of necessity must be worked out in the light of the foregoing fact. A disregard of it is so inherently opposed to reason as to be almost inconceivable. Men have to live and plan their daily lives in the light of what they know or may fairly be presumed to know. They have

to arrange their affairs, make their decisions, choose between one course of conduct and another in the light of present conditions, modified to some extent possibly by the cloudy half light of a guess as to the future.

A woman in 1907 makes a contract in the form of a trust. She complies with the law. She parts with her property under certain specified conditions, both conservative and commendable; she does it irrevocably. She acts in the light of conditions present to her in 1907; the laws then existing are read into her trust. No estate tax law exists then or until nine years later. She does not know about it, because it is unknowable. She makes her calculations and arranges her affairs in necessary ignorance of what is to be. She does not evade. There is nothing to attempt to evade. Then in 1916, or 1918, a Congress comes into being and by the enactment of a law gives a quality to the acts of this woman never intended or guessed at by her and fastens upon those acts serious consequences which were never in her contemplation.

Was it not the recognition of such possibilities in analogous situations, that put into the Constitution the inhibition against *ex post facto* laws? Mr. Chief Justice Taft, in the *Child Labor Tax Case*, *supra*, said at 259 U. S. 38:

> "The difference between a tax and a penalty is sometimes difficult to define."

The effect of the tax in the case at bar is to penalize retroactively.

Do not the provisions of the Statute under consideration "transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems"?

We submit that the judgment of the court below should be affirmed, if not on the ground that Section 402 (c) rightly construed is retroactive only to 1916, then on the ground that the Section is unconstitutional.

Respectfully submitted,

Tyson S. Dines,
Peter H. Holme,
Harold D. Roberts,
J. Churchill Owen,

Amici Curiae.